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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 265

NOEL BRYANT JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 30–36; Pet. App. 15–20) is reported at 290 F. 2d 866. The opinion of the district court (R. 9–23; Pet. App. 21–33) is reported at 187 F. Supp. 439.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1961 (R. 37; Pet. App. 41). A petition for rehearing was denied on July 1, 1961 (Pet. App. 42). The petition for a writ of certiorari was filed on July 28, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A grand jury returned an indictment charging petitioner, as president of a bank, with embezzling a credit of the bank, described as a promissory note for $5,000. Petitioner moved to dismiss on the ground that it could not be determined from the face of the indictment whether it charged a misdemeanor, for which the value of the credit must be less than $100, or a felony, for which the value of the credit must be in excess of $100. While the motion was pending, the grand jury was recalled and it returned a superseding indictment in the same terms, but with an additional allegation that the note was "of a value in excess of" $100.00. The question is whether the superseding indictment was void for failure of the grand jury to hear some evidence in addition to the evidence it had already heard before it returned the first indictment.

STATUTE INVOLVED

Title 18, Section 656 of the U.S. Code provides in pertinent part:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank * * * embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds, or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee * * *, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not

exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

Petitioner was indicted on April 21, 1960, in the United States District Court for the Western District of Louisiana on a charge of embezzling a credit of a bank, in violation of 18 U.S.C. 656 (R. 1–2). The district court sustained petitioner's motion to dismiss the indictment (R. 9–23; Pet. App. 21–33). On appeal by the government, the court of appeals reversed (R. 30–36; Pet. App. 15–20, 41).

The circumstances giving rise to the question on which petitioner seeks review are as follows:

1. On February 19, 1960, the grand jury had returned an indictment which alleged that on or about December 23, 1957, petitioner, then the president of the Farmerville Bank, an insured bank, had embezzled and converted to his own use a credit of the bank, described as a promissory note for $5,000, dated December 16, 1957, signed by Wayne R. Deacon and J. C. Lolly as co-makers, and payable to the order of petitioner personally. The indictment further alleged that petitioner had sold, on behalf of the bank, certain furniture and fixtures of the bank to Deacon and Lolly and had sold their note, which he received in payment, to the Farmerville Brokerage and Insurance Agency, knowing that it was the property and a credit of the bank (R. 3–4; Pet. App. 34).[1]

[1] On May 14, 1959, a former grand jury had returned an indictment against petitioner under the same statute, 18 U.S.C. 656. That indictment alleged the misapplication of furniture

Petitioner moved to dismiss the indictment on the ground that, since 18 U.S.C. 656 denominates the offense charged as a misdemeanor if the value of the embezzled property does not exceed $100 and as a felony if its value exceeds that amount, and since the indictment did not allege the value of the note involved, the indictment made it impossible to determine whether petitioner was charged with a felony or a misdemeanor (R. 11–12; Pet. App. 21–23).

2. While petitioner's motion was pending, the government again referred the matter to the same grand jury, which returned the present superseding indictment of April 21, 1960. Immediately after the return of the new indictment, the district court sustained the government's motion to dismiss the February indictment (R. 12–13; Pet. App. 24). The superseding indictment, over the signature of the same grand jury foreman who had signed the earlier indictment, was identical with the earlier indictment, except that, in describing the note, the superseding indictment contained the additional clause, "of a value in excess of One Hundred and No/100 ($100.00) Dollars", and alleged that petitioner's sale of the note to the Farmerville Brokerage and Insurance Agency was "for a sum in excess of One Hundred and No/100 ($100.00) Dollars" (R. 1–2; Pet. App. 36).

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and fixtures belonging to the bank. It was dismissed on petitioner's motion, to which the government consented, on the ground that chattels belonging to a bank are not "moneys, funds or credits" within the meaning of the statute (R. 10, 30–31).

Petitioner moved to dismiss the superseding indictment on the ground that it was returned by the grand jury "acting without the appearance of a single witness * * * and without any competent supporting evidence whatsoever" (R. 5; Pet. App. 38).

In opposing the motion, government counsel conceded that no witnesses were "called before the Grand Jury when the third,[2] or superseding, Indictment was returned", but pointed out that "inasmuch as the Grand Jury had heard the Government's evidence when the second Indictment was returned on February 19, 1960, recalling the same witnesses for the giving of repetitious testimony on April 21, 1960, the date on which the superseding Indictment was returned, would have been a vain and useless thing" (R. 16; Pet. App. 27).

In sustaining the motion to dismiss, the district court, after observing that the indictment returned in February was "defective in its substance, in failing to allege either a felony or a misdemeanor", stated that there was "no evidence before this Grand Jury as to the value of the note when it returned [the February] indictment. Otherwise, it would have been alleged. Likewise there must have been no evidence then as to defendant's having sold the note for more than $100, or that, too, would have been alleged." The court concluded that, in view of the government's concession that the evidence presented to the grand jury prior to the return of the February indictment was not presented to the grand jury again prior to the return of the April indictment, which it characterized

[2] See note 1 above.

as a "new indictment", the presumption of validity did not attach and the indictment was invalid for lack of supporting evidence before the grand jury (R. 21–22; Pet. App. 31–33).

The court of appeals rejected the district court's reasoning, holding that there was "a complete absence of any positive factual showing that this Grand Jury did not at any time while it was hearing evidence concerning this transaction have before it some evidence from which it would infer a valuation in excess of $100" (Pet. App. 19).

ARGUMENT

In this Court, petitioner's attack upon the superseding April indictment is based upon the propositions (1) that the record discloses that no evidence was ever presented to the grand jury and (2) that, since the February indictment was dismissed as defective, no inference can be drawn that the February indictment (or, *a fortiori*, the April indictment) was supported by some competent evidence (Pet. 5, 7, 10–11, 12). Petitioner's first premise is wrong, and his second is a *non sequitur*.

1. In support of the first proposition, petitioner quotes statements in the district court's opinion to the effect that "no evidence" was submitted to the grand jury (Pet. 6). But the district court did not find that "no evidence" was ever presented to the grand jury. On the contrary, the court accepted, and petitioner did not dispute, government counsel's statement, in opposition to the motion to dismiss the April indictment, that the grand jury "had heard the Government's evidence" (see Statement, *supra*, p. 5) before it returned the February indictment. The

passages from the court's opinion which petitioner cites here show on their face and in context that the court was merely referring to the conceded fact that the evidence presented to the grand jury prior to the return of the February indictment was not presented to that body again prior to the return of the April indictment. Indeed, this was the very basis of the court's ruling dismissing the April indictment. Without questioning that there was an evidentiary basis for the February indictment, the court inferred that the new allegations in the April indictment as to the value of the note involved (see the Statement, *supra,* pp. 3–5) could not have been based upon any evidence the grand jury had heard in February, or otherwise the February indictment would have contained such allegations. Nor was the court willing to "assume * * * that there was evidence before the Grand Jury prior to the * * * [February] indictment as to the value of the note or the amount for which it was sold," as alleged in the April indictment (Pet. App. 32).

The February indictment was dismissed at the instance of the government because it had been superseded by the April indictment. The latter indictment was returned merely to meet petitioner's specific objection that the February indictment had not alleged the value of the note, but only that it was a note for $5,000 (see the Statement, *supra,* pp. 3–4). But this defect, if it be a defect, furnishes no basis for petitioner's contention that both indictments were thereby rendered vulnerable to attack on the ground that they were not based on any evidence. There was no dispute that the grand jury "heard the Government's

evidence" prior to the return of the February indictment or that it acted on that evidence in returning the April indictment.

2. The district court acted on mere surmise in holding that the new allegations in the April indictment as to the value of the note and the amount for which petitioner sold it were not based on evidence heard before it returned the February indictment. As the court of appeals pointed out, there was no showing that there was no such evidence before the grand jury (Pet. App. 19). In these circumstances, the rule of *Costello* v. *United States*, 350 U.S. 359, 363, is controlling: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."

Although petitioner would require a grand jury to rehear the same evidence it had heard previously before returning a superseding indictment, he offers no persuasive reason for this vain and useless procedure with its resultant delay. Rather, a far more logical rule, formulated by the court of appeals, is that a grand jury, having heard witnesses once, should not be obliged to recall them and hear repetitious evidence when it is reconsidering the same facts and circumstances (Pet. App. 19–20).[3] Accord, *Eidson* v. *United States*, 272 F. 2d 684, 687 (C.A. 10).

[3] Petitioner's contention (Pet. 8–9) that the court of appeals was not justified in reversing the "discretionary" action of the district court in dismissing the indictment is based upon cases decided prior to this Court's decision in the *Costello* case, *supra*. Those decisions were predicated upon the proposition that it is permissible to inquire into the adequacy or competency of the evidence before a grand jury and are no longer authoritative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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